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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JASON P, a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. KERI S., Defendant and Appellant.	D061156 (Super. Ct. No. J517854)

APPEAL from a judgment of the Superior Court of San Diego County, Laura J. Birkmeyer, Judge. Reversed and remanded with directions.

Keri S. appeals the judgment terminating her parental rights to her son, Jason P., Jr. (Jason). Keri challenges the juvenile court's finding the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) was inapplicable. Specifically, Keri contends no ICWA notice was sent to the Chickasaw Nation, Oklahoma (the Chickasaw Nation); and

Jason was an Indian child with reference to the Choctaw Nation of Oklahoma (the Choctaw Nation). We agree with the first contention.

BACKGROUND

In July 2010, shortly before Jason's fifth birthday, the San Diego County Health and Human Services Agency (the Agency) filed a dependency petition alleging Jason was exposed to violence between his father, Jason P., Sr. (Jason Sr.) and Keri. The Indian Child Inquiry Attachment (ICWA-010[A]; Cal. Rules of Court,[1] rule 5.481(a)(1)), filed with the petition, stated Jason "is or may be a member of or eligible for membership in [the Cherokee] tribe;" his "parents, grandparents, or great-grandparents are or were members of [the Cherokee] tribe;" and Jason "may have Indian ancestry." The source of these statements was Keri's assertion she had Cherokee heritage. Jason Sr. denied having any Indian heritage.

Jason was detained in foster care. A few weeks after the detention hearing, Keri denied having any Indian heritage. The same day, she filed a Parental Notification of Indian Status (ICWA-020; rule 5.481(a)(2)) declaring under penalty of perjury that she might have Cherokee ancestry.[2]

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1 All further rule references are to the California Rules of Court.

2 Later, the Agency sent ICWA notices to the three federally recognized Cherokee tribes (75 Fed. Reg. 60810). The Agency received responses from two of the tribes. The Eastern Band of Cherokee Indians said Jason was not registered or eligible to register as a member of the tribe, and the Cherokee Nation said he would not be considered an Indian child. The third Cherokee tribe, the United Keetoowah Band of Cherokee Indians of Oklahoma, did not respond.

Keri and maternal grandmother Sherri R. gave the Agency the following information for the Notice of Child Custody Proceeding for Indian Child (ICWA-030; rule 5.481(a)(4)(A)). Sherri "could be 1/80th Choctaw" but was "not registered with the Choctaw Tribe." Jason's maternal great-grandmother, Sandra W., "possibly" was "1 6/4" [*sic*.] Choctaw. Sherri's maternal great-great grandmother, Ida W., and maternal great-great aunt, Ida G., were registered members of "the Choctaw tribe." Ida W. was one-sixteenth Choctaw and was also a registered member of "the Chickasaw tribe." In July 2010, the Agency sent notices containing this information to the Secretary of the Interior; the Bureau of Indian Affairs (BIA); and the three federally recognized Choctaw tribes: the Choctaw Nation; the Jena Band of Choctaw Indians, Louisiana; and the Mississippi Band of Choctaw Indians, Mississippi (75 Fed. Reg. 60810).

The Agency received responses from two of the Choctaw tribes. The Mississippi Band of Choctaw Indians stated Jason, Keri and Jason Sr. were not enrolled members and were not eligible for enrollment. The Choctaw Nation stated it was "able to establish Indian heritage for Ida W[.] . . . . However, in order for the Tribe to intervene, it is necessary that the birth parent(s) and the child(ren) obtain their [certificate of degree of Indian blood (CDIB)] and membership through our tribal membership department. [¶] According to the Constitution of the Choctaw Nation . . . , ARTICLE I, MEMBERSHIP Section 1. The Choctaw Nation . . . shall consist of all Choctaw Indians by blood whose names appear on the final rolls of the Choctaw Nation . . . and their lineal descendants. However, according to [ICWA] an 'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for

membership in an Indian tribe and is the biological child of a member of an Indian tribe. [¶] Therefore, [ICWA] will not apply until this is done. We will be glad to assist you in obtaining family members CDIB and membership cards." Although not mentioned in The Choctaw Nation's response, the Agency stated in its report the "Choctaw Nation is requesting an original birth certificate to establish whether [Keri] is eligible for membership."

In August 2010 the court made a true finding on the dependency petition. At the dispositional hearing in November, the court found there had been proper ICWA notice. The Agency's counsel said the Agency had ordered "the original birth certificate [for the Choctaw Nation], but we won't have that for sometime." The Agency's counsel continued, "I don't know if the court would want to defer that until we get the birth certificate and send it to them."[3] Keri's counsel said Keri was not seeking membership in any tribe. Jason's counsel said his investigator had spoken to five-year-old Jason, at the court's request, and Jason said "he did not want to be considered for Indian heritage either." Jason's counsel said that as Jason's guardian ad litem, "I would not ask that he be considered for Indian heritage either." The court enumerated the benefits of tribal membership, and Keri's and Jason's attorneys confirmed their clients were nevertheless declining the Choctaw Nation's assistance in applying for membership. The court noted it could not "force [Keri] to apply to become a member of the tribe" and it could not "require [Jason] to apply." The court found ICWA was inapplicable. The court made the

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3 Keri characterizes this statement as a request for a continuance. Whether it was or was not is of no import.

finding without prejudice, and ordered that if Keri or Jason's guardian ad litem changed position, sought tribal membership and supplied the required information to the Choctaw Nation, they were to notify the court within one week, and the ICWA notice process would begin anew. The court ordered Jason removed from parental custody and placed in foster care.

At the six-month review hearing in May 2011, the court ordered Jason placed with Keri. A couple of weeks later, Jason was exposed to further domestic violence between Jason Sr. and Keri. The court issued a protective custody warrant for Jason and in June, he was detained with a paternal uncle. In September, the court ordered Jason placed with a relative and set a Welfare and Institutions Code section 366.26[4] hearing for December.

At the section 366.26 hearing, Keri submitted on the Agency's report. Jason's counsel asked the court to follow the Agency's recommendation that parental rights be terminated. The court terminated parental rights and referred Jason for adoption.

DISCUSSION

I

Forfeiture

Preliminarily, we reject the Agency's contention that Keri has forfeited or waived her right to raise ICWA issues. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 258-261.) It is not only Keri's interests that are at stake here. "Congress enacted the ICWA to 'protect the best interests of Indian children and to promote the stability and

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4 Further statutory references are to the Welfare and Institutions Code.

security of Indian tribes and families.' [Citation.]" (*Id*. at p. 253.) ICWA "notice is intended to protect the interests of Indian children and tribes despite the parents' inaction." (*Id*. at p. 261.) For similar reasons, the invited error doctrine is inapplicable. (*Id*. at p. 257.) Additionally, the disentitlement doctrine is inapposite. "Under the disentitlement doctrine, a reviewing court has the inherent discretionary power to dismiss an appeal when the appellant has refused to comply with trial court orders. The doctrine thus 'prevents a party from seeking assistance from the court while that party is in an attitude of contempt to legal orders and processes of the court' and 'may be applied when the balance of the equitable concerns make it a proper sanction.' [Citation.]" " 'In dependency cases the doctrine has been applied only in cases of the most egregious conduct by the appellant that frustrates the purpose of dependency law and makes it impossible for the court to protect the child or act in the child's best interests' . . . ." (*In re A.G.* (2012) 204 Cal.App.4th 1390, 1399, quoting *In re Z.K.* (2011) 201 Cal.App.4th 51, 63, italics omitted.)

We address the merits.

II

Jason's Status As An Indian Child
With Reference To The Choctaw Nation[5]

ICWA applies to "child custody proceedings involving Indian children." (*In re Jack C., III* (2011) 192 Cal.App.4th 967, 976, fn. omitted.) "[E]xcept as may be

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5 Keri makes general references to "the Choctaw tribe" as well as specific references to "the Choctaw Nation." It is clear from the context of her argument that she is referring to the Choctaw Nation and not to either of the other two Choctaw tribes.

specifically provided otherwise, ... [¶] 'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4); accord, § 224.1, subd. (a).) The tribe determines whether a child meets these requirements. (*Dwayne P. v. Superior Court, supra,* 103 Cal.App.4th at pp. 254-255; *In re Damian C.* (2009) 178 Cal.App.4th 192, 199.) " 'It is the tribe's prerogative to determine membership criteria.' [Citations.] 'Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative.' [Citation.]" (*In re Jack C., III, supra,* at p. 978.) "Because of differences in tribal membership criteria and enrollment procedures, whether a child is an Indian child is dependent on the singular facts of each case." (*Id*. at p. 979.) We review the juvenile court's ICWA findings for substantial evidence. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1530.)

Keri takes a scattershot approach in her contentions regarding the Choctaw Nation. Those contentions are as follows. The juvenile court's refusal to allow the Agency to send Keri's birth certificate to the Choctaw Nation deprived that tribe of the ability to ascertain her and Jason's eligibility for membership, and eviscerated the ICWA notice. There is no indication enrollment is a prerequisite for membership. Jason may be eligible for membership despite Keri's intent not to pursue membership. The Choctaw Nation considered Jason eligible for membership and therefore an Indian child, as evidenced by its offer to assist in obtaining CDIB and membership cards. Whether Jason is an Indian child is for the determination of the tribe, not the court. The court based its ICWA

finding on an investigator's conversation with Jason and on the Choctaw Nation's response, rather than on the Choctaw Nation's Constitution. Jason's trial counsel was ineffective in informing the court that Jason did not wish to pursue membership, rather than helping him obtain membership. Even if Jason is not an Indian child, the court was required to proceed as if he were.[6]

Keri's contentions are based on irrelevancies, and on misinterpretations of the Choctaw Nation's response, the court's ICWA finding and applicable law. All of her contentions are resolved by the Choctaw Nation's express statement, in its response, that unless one of Jason's parents became a member, it would not intervene and ICWA would not apply. In light of this statement, and Keri's unequivocal assertion that she was not seeking membership in any tribe, her contentions come to naught.

Although the juvenile court determines whether the child is an Indian child, and thus whether ICWA applies, that determination is constrained by the tribe's exclusive right to determine its own membership. (*In re Jack C., III, supra*, 192 Cal.App.4th at pp. 976-979.) According to the Choctaw Nation, Jason cannot be an Indian child unless he "is the biological child of a member." To that end the Choctaw Nation offered assistance in obtaining CDIB and membership cards for both Jason and his parents. There is no indication Jason Sr. has any Indian heritage, let alone membership in the

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6 Keri also refers to the belief of the Agency's counsel, at the dispositional hearing, that Jason "can be a member just by filling out a document." Counsel's belief, of course, is neither evidence nor legal authority. Furthermore, the Agency's trial counsel also stated, "if the parents do not become members, the child is not . . . a member of an Indian tribe."

Choctaw Nation. Thus, for Jason to be an Indian child with respect to the Choctaw Nation, Keri must be a member. She is not, and does not intend to become one. Sending Keri's birth certificate to the Choctaw Nation has nothing to do with the viability of the ICWA notice, and would not have changed the dispositive fact that she was not a member and would not become one. In making the ICWA finding, the court properly relied on the Choctaw Nation's response, and did not base its finding on the investigator's conversation with Jason. Finally, Jason's appellate counsel contends ICWA did not apply, and correctly notes that "Jason's eligibility and enrollment as an Indian child were dependent on a condition that could not be met so long as Mother did not want to become a member and take steps to enroll herself in the Choctaw tribe."

III

Notice To The Chickasaw Nation

A

Request For Judicial Notice

The Agency requests judicial notice of the Code of the Chickasaw Nation (the Code) and attaches a copy of the Code, "acquired online," to its request and its supporting memorandum of points and authorities. The Agency contends the Code shows the ICWA finding should be affirmed. Keri opposes the request for judicial notice.

The Agency's failure to introduce the Code in the juvenile court would not necessarily be fatal to its request on appeal, as Keri urges. (*In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1313; but see *In re Laura F.* (2000) 83 Cal.App.4th 583, 593, fn. 6.) Additionally, the Agency does not present the Code in an attempt to obtain reversal of the

judgment. (*In re Zeth S.* (2003) 31 Cal.4th 396, 407.) Keri is correct, however, in suggesting the Agency's presentation of the Code is akin to "an unsworn statement by . . . counsel." (*Ibid.*) We deny the request for judicial notice.

B

The Merits

If there is reason to know the case involves an Indian child, the Agency must give ICWA notice. (25 U.S.C. § 1912(a); § 224.2, subds. (a), (b).) Notice is required if "a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe." (§ 224.3, subd. (b)(1); *In re Damian C., supra,* 178 Cal.App.4th at p. 198.) Because family members " 'are not necessarily knowledgeable about tribal government or membership and their interests may diverge from those of the tribe' " (*In re Mary G.* (2007) 151 Cal.App.4th 184, 212, quoting *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1425), a relative's statement that the family lacks sufficient information to determine Indian heritage does not absolve the Agency of its duty to provide ICWA notice (*In re Damian C., supra,* at p. 199). The notice requirement is strictly construed (*In re Karla C.* (2003) 113 Cal.App.4th 166, 174, quoting *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267), and applies even if the child's Indian status is uncertain *(In re Kahlen W., supra,* at p. 1422). The showing required to trigger the statutory notice provisions is minimal. (*Dwayne P. v. Superior Court, supra,* 103 Cal.App.4th at p. 258.)

Here, there was a sufficient showing to trigger the ICWA notice requirement. The Agency had information that Sherri's maternal great-great grandmother, Ida W., was a registered member of the Chickasaw Tribe. Nevertheless, the Agency did not send ICWA notice to the Chickasaw Nation, the only federally registered Chickasaw Tribe (75 Fed. Reg. 60810). This was error, and the court erred by finding there had been proper ICWA notice and ICWA was inapplicable. This requires reversal of the judgment, and a limited remand to the juvenile court.

DISPOSITION

The judgment terminating parental rights is reversed. The case is remanded to the juvenile court with directions to order Agency to provide ICWA notice regarding the Chickasaw Nation and file all required documentation with the court. If, after proper notice, the Chickasaw Nation claims Jason is an Indian child, the court shall proceed in conformity with ICWA; otherwise, the court shall reinstate the judgment terminating parental rights.

BENKE, Acting P.J.

WE CONCUR:

NARES, J.

O'ROURKE, J.